IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,
Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge; HONORABLE DAN M. RUSSELL, JR., United States District Judge; HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
Respondents.

RESPONSE OF THE JUDGES, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

JAMES P. COLEMAN
United States Circuit Judge

DAN M. RUSSELL, JR.
Chief
United States District Judge

HAROLD COX
United States District Judge
P.O. Box K
Ackerman, Miss., 39735

January, 1979

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RESPONSE OF THE JUDGES, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

The undersigned members of the 3-Judge District Court hope that a brief response to the Motion for Leave to File a Petition for Writ of Mandamus may be helpful. Accordingly, we respectfully file this response, in which we seek to set forth the present status of this litigation.

I

On May 31, 1977, the Supreme Court disapproved the *single member* Mississippi legislative reapportion-

ment plan devised by this Court for the reason that it failed to meet the requirement that legislative districts be "as nearly of equal population as is practicable", Connor v. Finch, 431 U.S. 407, 97 S. Ct. 1828, 52 L.Ed.2d 465. Respect for longstanding state policy against fracturing county lines (which had necessitated the population deviations then at issue) was held not to be an adequate cause for such deviations.

At all events, we were confronted with a most difficult problem because the voting precinct is the basic unit of Mississippi's electoral process. Precinct boundaries are formulated at the local level by county boards of supervisors. Each of the five county supervisors is elected from a single member district, generally referred to as a "beat"; the precincts have to conform to beat lines, and this has been true since the adoption of the Constitution of 1890. The 1970 federal census was not taken by precincts. The enumeration districts generally had no definable reference to precinct lines.

II

The mandate of the Supreme Court in Connor v. Finch, *supra,* was filed in our Court on July 28, 1977.

It was obvious that the only adequate way of getting reasonably accurate population figures upon which to construct legislative districts with *de minimus* population variations was to enlist, if possible, the financial resources of the State by legislative appropriation of the funds to do the necessary research.

Four days after the receipt of the Supreme Court mandate, we formally invited the Mississippi Legislature to file within ninety days a plan of its own composition, agreeably to the standards enunciated in Connor v. Finch, *supra.*

On August 9, 1977, the Governor called a special session of the Legislature to take action on the invitation which had been extended by the Court.

Without going into detail as to hundreds of thousands of dollars appropriated state funds, and the various actions taken by the Legislature, the necessary experts and special legal counsel were employed and put to work on the production of a reapportionment plan which would meet constitutional standards.

On February 14, 1978, a legislatively proposed *precinct* plan was submitted to the Court. A hearing was held, resulting in the filing of a final plan on March 7, 1978.

It was public knowledge that, using the data compiled and the staff employed in the composition of a court ordered plan, the legislature was seeking to enact a *statutory* plan which would meet constitutional requirements. These efforts culminated in reapportionment statutes, signed by the Governor on April 21, 1978.

The legislative enactment had to be submitted to the Attorney General of the United States in compliance with the Voting Rights Act. Had the statute received the approval of, or gone without the opposition of, the Attorney General this litigation would have been at an end.

The Attorney General did object, however, on July 31, 1978 (the last available day).

An action for § 5 declaratory relief was filed in the District Court of the District of Columbia, as the Court

is informed, on August 1, 1978. That case has been tried and the District of Columbia Court has set oral argument on January 16, 1979.

In the meantime, on June 12, 1978, we called on the parties to make an effort to settle their narrow differences over the court ordered plan, looking to a stipulated plan which would have ended the litigation.

By September 5, 1978, the parties had agreed on the geographical composition of the 174 legislative districts but they had differences of opinion about the wording of the necessary stipulation which would have ended in a consent decree.

At that time, the suit for a § 5 declaratory judgment in the District of Columbia Court had been on file for about thirty days. It is our recollection, which we have had no opportunity to verify by an actual review of the record, that the District of Columbia trial was scheduled to begin on September 18, or thereabouts.

III

Under Mississippi law, candidates who propose to run in Democratic or Republican primaries for the Legislature have until June 7, 1979, in which to file qualifying papers, a date now approximately five months away.

We have considered it to be not in the public interest to order the adoption of a court ordered plan at this time for if we should do so the plan would, of course, be widely publicized and much confusion would ensue if the legislatively enacted plan prevails in the District of Columbia Court, superseding our court ordered plan.

If the District of Columbia Court should fail to decide its case by May 7, 1979, thirty days ahead of qualifying time, a court ordered plan would then immediately be placed into effect, subject to whatever action that might be required by the course of later events. If at any time between now and May 7, the District of Columbia Court finds that the legislatively enacted reapportionment is unconstitutional, we would immediately institute a court ordered single member district plan.

IV

All pending vacancies in the Mississippi Legislature have been ordered filled in a judgment entered by this Court on January 2, 1979. The vacancies in House District 28 and in Senate District 15A did not come into existence until January 1, 1979. The vacancy in Senate District Number 6 occurred about the last week in December. The method to be used in filling these vacancies was agreed to by all the parties to this litigation.

The vacancy in House District 30 had existed for about a year, but a preliminary injunction against an election to fill that vacancy had been entered at the petition of the plaintiffs. The plaintiffs and those representing Governor Finch, Et Al, could not agree on the manner of filling this vacancy, whereupon the court entered the plan suggested by the plaintiffs and the Department of Justice.

The Governor immediately ordered special elections for January 13, 1979.

V

In pursuing this policy of not erecting a court ordered legislative reapportionment plan until May 7,

1979, or until the District of Columbia Court shall have acted adversely at an earlier date, this Court has adhered to the teachings of the Supreme Court in Wise v. Lipscomb, —— U.S. ——, 98 S.Ct. 2493, 2497 (1978):

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part should not be restricted beyond the clear commands of the Equal Protection Clause."
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts "will be held to stricter standards . . . than will a state legislature . . . ."
>
> (Citations omitted).

This language in *Wise* v. *Lipscomb* was authored by Mr. Justice White, joined by Mr. Justice Stewart. However, no other Justice recorded disagreement with these principles.

VI

It is not entirely correct that the instant litigation has been "going on for thirteen years". Our plan for the election of legislators in 1967 was not appealed. The litigation was again fired up after the 1970 Census.

The litigation has not been without results:

(1) The 160 year old Mississippi policy of having numerous multi-member legislative districts has been dismantled;

(2) The 160 year old policy against fracturing county lines in the election of legislators has been dismantled;

(3) The Legislature, with voter approval, has provided for a Legislative Reapportionment Commission which will act hereafter in reapportionment matters if the Legislature fails to act; and

(4) The population data so badly needed in our previous efforts to reapportion were obtained.

CONCLUSION

If the Supreme Court should be of the opinion that our handling of the situation herein described amounted to an abuse of judicial discretion, or that for any cause a court ordered reapportionment plan should be entered without waiting on the decision of the District of Columbia Court, it will not be necessary for the Court to expend the judicial effort required to hear and determine a mandamus proceeding. We stand ready immediately to obey the directions of the Supreme Court of the United States if any are stated in the disposition of the Motion to which this response is filed.

Respectfully submitted,

JAMES P. COLEMAN
United States Circuit Judge

DAN M. RUSSELL, JR.
Chief
United States District Judge

HAROLD COX
United States District Judge
P.O. Box K
Ackerman, Miss., 39735

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